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No. 00-952

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

BRIEF FOR PETITIONER

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QUESTION PRESENTED

This case requires interpretation of the spousal impoverishment provisions of the federal Medicaid Act, 42 U.S.C. § 1396r-5 (1994 and Supp. 2000). The spousal impoverishment provisions permit a community spouse living at home to retain certain income and resources to meet his or her own monthly maintenance needs when the spouse in a nursing home becomes eligible for Medicaid. The statute provides for a standard amount of resources that need not be depleted when the institutionalized spouse qualifies for Medicaid. The statute permits an increase in the standard allowance, however, if the community spouse can show that he or she will not have a certain minimum level of income on which to live once the institutionalized spouse qualifies for Medicaid. When determining whether the community spouse is entitled to shelter resources in excess of the standard resource allowance, Wisconsin, like more than thirty other states, first considers whether potential income transfers from the institutionalized spouse expressly permitted by the statute will be sufficient to provide for the community spouse's monthly needs, once Medicaid eligibility occurs. The question presented is:

Whether the "income first" requirement of the Wisconsin Medicaid spousal impoverishment statute, Wis. Stat. § 49.455(8)(d) (1995-96), requiring that potential income transfers from the institutionalized spouse be considered part of "the community spouse's income" for purposes of determining whether a higher resource allowance is warranted, conflicts with 42 U.S.C. § 1396r-5.

LIST OF PARTIES

Actual parties to the proceedings in the Wisconsin Court of Appeals and Wisconsin Supreme Court were:

The Wisconsin Department of Health and Family Services, State of Wisconsin,

Petitioner herein,

Irene Blumer, Petitioner-Appellant in the Wisconsin courts,

Respondent herein.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The administrative decision of the hearing examiner on behalf of the Wisconsin Department of Health and Family Services ("WDHFS"), *In the Matter of Irene G. Blumer*, MED-23/12842 dated June 10, 1997, is unreported (Pet-Ap. 23a-33a).[1] The judgment of the Green County

[1] "Pet-Ap." identifies the indicated pages from the Appendix to the WDHFS' Petition for Writ of Certiorari. "J.A." refers to the Joint Appendix.

(Wisconsin) Circuit Court, No. 97-CV-0141, dated February 15, 1999, is also unreported (Pet-Ap. 19a-20a). The opinion of the Wisconsin Court of Appeals, District IV, is reported at 237 Wis. 2d 810, 615 N.W.2d 647 (Pet-Ap. 1a-17a). The order of the Wisconsin Supreme Court denying discretionary review is unreported (Pet-Ap. 18a).

JURISDICTION

The decision of the Wisconsin Court of Appeals was filed on June 8, 2000. Petitioner filed a timely petition for discretionary review in the Wisconsin Supreme Court which was denied by an order filed September 12, 2000 (Pet-Ap. 18a). The petition for writ of certiorari was filed December 11, 2000, and was granted on June 25, 2001. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY PROVISIONS INVOLVED

Because of their length, the spousal impoverishment provisions of the federal Medical Assistance statute ("Medicaid" or "MA"), 42 U.S.C. § 1396r-5, created by § 303 of the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), Pub. L. No. 100-360, § 303, 102 Stat. 683, and of Wis. Stat. § 49.455 (1995-96) are set forth at Pet-Ap. 34a-77a.

The particular provision of the MCCA on which the court below relied when it concluded that the Wisconsin statute conflicts with the federal statute, 42 U.S.C. § 1396r-5(e)(2)(C), provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

The "income first" provision of the Wisconsin Statutes contained in Wis. Stat. § 49.455(8)(d) (1995-96),[2] states in pertinent part:

> (8) FAIR HEARING. . . .
>
> . . . .
>
> (d) If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, *the department may not establish an amount to be*

[2]Wisconsin Stat. § 49.455(8)(d) has not changed significantly since 1996. *See* Wis. Stat. § 49.455(8)(d) (1999-2000). However, the 1995-96 version of the statute is the one involved here.

used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b)
. . . .

STATEMENT OF THE CASE

A. Statutory background.

Medicaid is a joint state and federal program designed to provide necessary medical care for persons unable to afford such care. *See* 42 U.S.C. §§ 1396-1396v (1994 and Supp. 2000). Generally, only those individuals with income and resources below prescribed levels are eligible for Medicaid. Where an individual's monthly income exceeds the prescribed level, the individual must, to be eligible for Medicaid, incur medical expenses sufficient to reduce his or her income to the prescribed level, a process known as "spending down." Excess resources must also be spent down[3] to the prescribed level.

The spousal impoverishment provisions of the federal Medicaid statute, 42 U.S.C. § 1396r-5 establish special rules for determining the Medicaid eligibility of married persons who are institutionalized, typically in a nursing home (the institutionalized spouse), and who have a spouse in the community (the community spouse).

Before 1988, individuals who qualified for Medicaid, either as "medically needy" or under an optional program, were required to apply much of their personal income to the

[3]In the context of Medicaid eligibility, "spending down" is technically limited to spending income on medical expenses. This brief occasionally uses the term in a non-technical sense to refer to the liquidation and spending of resources for the needs, medical or otherwise, of either spouse or for other valuable consideration.

cost of their nursing home care. Only limited amounts (which varied greatly from state to state) could be made available to a spouse living in the community. *See* H.R. Rep. No. 100-105, pt. 2 ("H. Rep."), at 66-68 (1987), *reprinted in* 1988 U.S.C.C.A.N. 803, 889-91.[4] In addition, except for a very low resource limit, resources owned either individually by the institutionalized spouse or jointly by both spouses were considered available solely for the costs of the care of the institutionalized spouse. *Id.* These income and resource limits had the effect of severely impoverishing the community spouse in many cases. *See Schachner v. Perales*, 648 N.E.2d 1321, 1322 (N.Y. 1995).

At the same time, pre-1988 law contained loopholes that allowed an institutionalized spouse to appear impoverished by sheltering the couple's resources solely in the community spouse's name or in trusts. As a result, those resources would be unavailable to the institutionalized spouse, who could then qualify for Medicaid at a higher level of affluence than that contemplated for the program, which was designed to provide assistance to the poor. *See* H. Rep. at 65-67, 1988 U.S.C.C.A.N. at 888-90.

The purpose of the spousal impoverishment provisions of the MCCA was to end the "pauperization [of the community spouse] by assuring that [he or she] has a sufficient—but not excessive—amount of income and resources available" while the other spouse is institutionalized. *See* H. Rep. at 65, 1988 U.S.C.C.A.N. at 888. The MCCA is the congressional response to the severe, impoverishing limitations under previously existing

[4]Prior to passage of the MCCA, the allowance permitted to the spouse living at home ranged between 0 in Oklahoma to a high of $632 per month in Alaska, with an average allowance in the range of $250 to $350. *See id.* at 68; 1988 U.S.C.C.A.N. at 890. Regardless of the precise amount, however, these monthly allowances for the spouse living at home were generally far below the poverty level.

provisions of the Medicaid Act on the income and resources that a community spouse could retain to remain in the community. *See generally* H.R. Conf. Rep. No. 100-661 ("Conf. Rep."), at 257-59 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1035-37. At the same time, Congress sought to end perceived abuses that permitted community spouses in some cases to insulate excessive amounts of the couple's assets from being used to defray the costs of care for the institutionalized spouse. *Cf.* H. Rep. at 66-67, 1988 U.S.C.C.A.N. at 889-90; *Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 805-06 (3d Cir.) ("*Cleary II*"), *cert. denied*, 528 U.S. 870 (1999).

The spousal impoverishment provisions of 42 U.S.C. § 1396r-5 are extraordinarily intricate. The statute contains six main subsections, § 1396r-5(a)-(f). *See id.; see generally* Conf. Rep. at 257-68, 1988 U.S.C.C.A.N. at 1035-46. Subsection 1396r-5(a) provides that institutionalized spouses are entitled to special treatment in determining Medicaid eligibility and that the provisions of the MCCA supersede other provisions of the Medicaid Act which are inconsistent.

The Resource Provisions

Subsections 1396r-5(c) and (f) created new rules for the treatment of marital resources when an institutionalized spouse applies for Medicaid and, subsequently, when the institutionalized spouse seeks to transfer certain resources to the community spouse. Together, these provisions ensure that a certain amount of resources are protected from depletion in qualifying the institutionalized spouse for Medicaid. Under § 1396r-5(c)(1), the total value of the couple's resources[5] at the beginning of the period of

[5]In making this calculation, "resources" does not include the home, an automobile, personal belongings and certain other forms of property. *See* 42 U.S.C. §§ 1396r-5(c)(5) and 1382b (1994 and Supp. 2000).

institutionalization is calculated and a one-half share is attributed to each spouse. Depending on the amount of each spouse's one-half share, the institutionalized spouse may need to spend virtually all of his or her resources in order to become Medicaid eligible. By contrast, the community spouse is permitted to retain a community spouse resource allowance ("CSRA" or "resource allowance"), which usually equals that spouse's entire one-half share.[6] The amount of the resource allowance can be adjusted at a fair hearing or by court order. *See* subsections (e)(2)(C) and (f)(2). The interspousal attribution of resources is made without regard to state marital or community property laws.[7]

The couple's resources are considered available to an institutionalized spouse (and therefore must be spent) only to the extent they exceed the resource allowance as of the time of application for Medicaid. *See* subsection (c)(2)(A) and

[6]Under § 1396r-5(f)(2)(A), the resource allowance does not equal the community spouse's one-half share when that share is below the resource allocation minimum (currently $50,000 adjusted annually), or above the maximum resource allocation (currently $84,120 in Wisconsin, adjusted annually). As adjusted, the maximum resource allowance in Wisconsin at the time Irene Blumer applied for Medicaid was then $76,740. Accordingly, if a couple's joint resources then totaled $200,000, the resource allowance was $76,740, rather than one-half of $200,000.

[7]"Attribution" and "deeming" are closely related concepts, although attribution is used particularly in § 1396r-5. In the spousal impoverishment context, "attribution" is self-defined as the procedure by which income and resources of one spouse are "considered available" to the other. See § 1396r-5(b)(2) and (c)(2). As the term suggests, attribution is a passive concept which, for example, permits but does not require one spouse to transfer income or resources to the other. Deeming is more generally a budgeting procedure in which income of a legally responsible relative is considered available to an applicant in determining an applicant's eligibility. For cases discussing deeming and availability of income and resources under pre-MCCA Medicaid law, *see Herweg v. Ray*, 455 U.S. 265 (1982); *Schweiker v. Gray Panthers*, 453 U.S. 34, 39-49 (1981); *cf.* 20 C.F.R. §§ 416.1160 and 416.1202 (2001) (deeming of income and resources under Supplemental Security Program).

(B). Once Medicaid eligibility is established for the institutionalized spouse, no resources of the community spouse can be deemed available to the institutionalized spouse (even if, by inheritance or otherwise, the community spouse later obtains significant additional resources). *See* subsection (c)(4); *see also* H. Rep. at 71, 1988 U.S.C.C.A.N. at 894.

The Income Provisions

Subsections 1396r-5(b) and (d) provide rules for the treatment of income, generally ensuring that the community spouse has a protected level of income on which to live after the institutionalized spouse qualifies for Medicaid. Subsection (b)(1) protects *any* income of the community spouse from being deemed available to the institutionalized spouse during months of institutionalization, incorporating the "name on the check" principle with regard to the community spouse. Under these rules, the community spouse's income is not considered in determining the Medicaid eligibility of the institutionalized spouse. Subsection (b) also provides special rules for the "attribution of income" of the institutional spouse for purposes of post-eligibility income adjustments authorized under subsection (d).

Once eligibility is established, subsection (d) protects the community spouse by allowing the institutionalized spouse to transfer part of his or her income to the community spouse, when necessary, before any remainder must be used to defray the costs of his or her institutional care. Subsection (d)(3) provides for the computation of the community spouse's minimum monthly maintenance needs allowance (MMMNA or minimum monthly need), an amount which ensures that the community spouse has income significantly above the poverty level. *See* subsection (d)(3)-(4). Subsection (d)(2) authorizes a

deduction from the institutionalized spouse's income if necessary to meet the minimum monthly need, a deduction called the community spouse monthly income allowance (CSMIA or income allowance[8]). This is the amount by which the minimum monthly need exceeds the monthly income otherwise available to the community spouse.

Remedial Provisions

Remedial provisions for notice and fair hearing are contained in § 1396r-5(e). In general, either spouse is entitled to a fair hearing if either is dissatisfied with the determination of the income allowance, the monthly income otherwise available to that spouse, the spousal share of resources under subsection(c)(1), the attribution of resources under subsection (c)(2) or the determination of the resource allowance. *See* subsection (e)(2)(A).

Under subsection (e)(2)(B), the hearing officer is authorized to revise the minimum monthly need upward under certain "exceptional circumstances." Under subsection (e)(2)(C) – the portion of 42 U.S.C. § 1396r-5 particularly at issue here – the hearing officer is authorized to revise the resource allowance when the "community spouse's income" is less than the minimum monthly need. (Increasing the resource allowance means that the institutionalized spouse has to spend less of his or her remaining resources, which would then go to the community spouse. The additional resources the community spouse may retain earns income that enables him or her to meet the minimum monthly need.)

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[8]The acronyms for terms defined by § 1396r-5, including CSRA, CSMIA and MMMNA, are commonly used in the cases and are set forth here for that reason. This brief uses both the shortened word forms and the acronyms.

B. Wisconsin's "income first" policy.

Wisconsin law, consistent with 42 U.S.C. § 1396r-5(e)(2)(C), requires the hearing officer to increase the amount of the resource allowance at a fair hearing if either spouse establishes that the standard resource allowance does not generate sufficient income to bring the community spouse's income up to the minimum monthly need. *Cf. id.*; Wis. Stat. § 49.455(8)(d). In doing so, however, Wisconsin allows increases in the standard resource allowance for the purpose of generating additional income for the community spouse only *after* considering potential income transfers from the institutionalized spouse to the community spouse. *See id.*[9] This policy, which Wisconsin has enacted by statute, *see* Wis. Stat. § 49.455(8)(d), is known as the "income first" rule.[10]

The "income first" approach is employed by more than thirty other states besides Wisconsin in their statutes, administrative rules or state Medicaid policies.[11] In effect,

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[9]Institutionalized spouses generally must use their income for the costs of care except for a $40 monthly personal needs allowance. The income that Wisconsin considers available to the community spouse is, thus, income that would ordinarily be spent on institutional care.

[10]*See, e.g., Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 799-800 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998); Ahmad, Omar N., *Medicaid Eligibility Rules for the Elderly and Long-Term Care Applicant*, 20 J. Legal Med. 251, *266 (June 1999).

[11]Research indicates that other "income first" states include Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming. Only a handful of states have codified the "income first" policy in a statute or administrative rule. *See* Colo. Rev. Stat. § 26-4-506 (1999); 10 Colo. Code Regs. 2505-10, § 8.112.13 (1999); Md. Regs. Code § 10.09.24.10-1.F.(4) (1998); N.J. Admin. Code § 10:71-5.7(d) (2000); Or. Admin. R. 461-160-0580(1)(f)(D) (2000).

the "income first" rule requires couples to use a greater portion of their resources for medical care, thereby postponing Medicaid eligibility. *See Cleary II*, 167 F.3d at 805.

Another group of states has adopted a "resource first" policy in the application of the fair hearing provisions of 42 U.S.C. § 1396r-5(e), as the Wisconsin Court of Appeals required in this case. Under the "resource first" approach, the institutionalized spouse is, in effect, permitted to transfer excess resources to the community spouse in order to generate additional income to raise his or her anticipated income to the level of the monthly needs allowance. Only if the additional resources fail to do so will the institutionalized spouse make his or her income available to the community spouse.[12] The effect of the "resource first" approach is to

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Wis. Stat. § 49.455(8)(d) (1999-2000). In most "income first" states, the policy is set forth in an administrative directive or policy manual, or simply represents the State Medicaid agency's interpretation of the "community spouse's income" within the context of 42 U.S.C. § 1396r-5(e)(2)(C). *See, e.g.*, Delaware Division of Social Services Medical Assistance Manual (DSSM) 20995.3.2 and 20970; Michigan Medicaid Program Administrative Manual, Item 600, p. 33; Minnesota Dept. of Human Services Health Care Programs Manual § 0909.25.05 (1998); South Carolina Department of Social Services Medicaid Policy Manual § 12.06. The relatively informal nature of some states' policies also accounts for the uncertainty about the precise number of states employing the "income first" approach. While the Solicitor General states that an informal federal survey questions the precise accuracy of the foregoing list, there is apparently no dispute that more than thirty states "currently use the income first method." *See* Brief for the United States as Amicus Curiae Opposing the Petition at 11 n.4.

[12]*See, e.g.*, 305 Ill. Comp. Stat. Ann. 5/5-4 (West 1998); Ill. Admin. Code, tit. 89, § 120.379 (West 2000); Mass. Gen. Laws ch. 118E, § 21A(c) (West, WESTLAW through ch. 161 of 2000 2d Ann. Sess.); Mass. Regs. Code tit. 130, § 520.017(C) (2000); *see also* Cal. Welf. & Inst. Code § 14006.4 (Deering, LEXIS through 2000 Supp., 1999 Sess.). Both Massachusetts and Ohio formerly used an "income first" approach, but have switched to the "resource first" approach. *See Thomas v. Com'r, Div. of Med. Assistance*, 682 N.E.2d 874, 877 n.8 (Mass. 1997) (noting statutory change); *Chambers*, 145 F.3d at 795; Ohio Admin. Code

render the institutionalized spouse eligible for Medicaid much sooner without having to spend excess resources down to the ordinary resource limit.

Finally, still other states employ a hybrid approach, leaving to the hearing officer's discretion whether to consider any permissible income transfer before increasing the standard resource allowance.[13]

Policy statements issued by the Secretary of the Department of Health and Human Services (HHS) and by its Health Care Financing Administration (HCFA),[14] the federal agency responsible for administration of the Medicaid program, have expressly approved use of the "income first" approach, as well as other "reasonable interpretations" of § 1396r-5.[15]

C. Facts.

This case arose as a proceeding for judicial review under the Wisconsin administrative procedure act, of an administrative decision of the petitioner WDHFS. The undisputed facts are set forth in the decisions of the Wisconsin Court of Appeals, District IV, and of the hearing examiner (*see* Pet-Ap. 2a-3a, ¶¶ 2-4; *see also* Pet-Ap. 24a-26a).

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§ 5101:6-7-02(C) (1999). *See generally Cleary v. Waldman*, 959 F. Supp. 222, 229-30 (D.N.J. 1997) ("*Cleary I*"), *aff'd*, *Cleary II*, 167 F.3d 801.

[13]*See Cleary I*, 959 F. Supp. at 229-30.

[14]"HCFA" recently changed its name to Centers for Medicare and Medicaid Services.

[15]*See* letter from HHS Secretary Shalala to Ohio Governor Voinovich and a series of HCFA policy statements included in the record (Pet-Ap. 78a-90a).

Irene Blumer was admitted to a nursing home in 1994. In December 1996, she, through her husband, Burnett Blumer, applied for Medicaid. The Green County, Wisconsin, Department of Human Services conducted an asset assessment to determine whether Irene was eligible for Medicaid benefits. The assessment indicated that the couple had total assets of $145,644 in 1994 when Irene was admitted to the nursing home. The county agency set Burnett's resource allowance at $72,822, or one-half of the couple's non-exempt assets. Based upon this resource allowance, the county agency established a total resource limit of $74,822—$72,822 for Burnett, as the community spouse, and $2,000 for Irene,[16] as the institutionalized spouse, before Irene would be eligible for Medicaid. On the date of Irene's Medicaid application, the couple had countable resources totaling $89,335. The county agency denied Irene's institutional Medicaid application because the Blumers were $14,513 above their resource limit of $74,822. *See* Pet-Ap. 3a, ¶ 2. (Put another way, the Blumers had to spend another $14,513 in resources before Irene would be eligible.)

Irene requested a hearing for the purpose of setting a higher resource allowance. *See* Wis. Stat. § 49.455(8)(d); 42 U.S.C. § 1396r-5(e)(2)(C). At the hearing, evidence established that Burnett's total monthly income was $1,702.45, including his social security income, an annuity and income from his resource share, which generated $377.85 per month in interest and dividends. This amount was about $25 below Burnett's minimum monthly need of $1,727 then established by state and federal law.[17] Irene

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[16]Individual Medicaid applicants are subject to a resource limit of $2,000. *See* 20 C.F.R. § 416.1205 (2001). The $2,000 limit applied to Irene by operation of 42 U.S.C. § 1396r-5(a)(1).

[17]The MMMNA in each state changes annually based on a statutory formula. *See* 42 U.S.C. § 1396r-5(d)(2)-(3). In Wisconsin, the current MMMNA is the lesser of $2,103 or $1,875 plus excess shelter expenses. *See* WI MA Handbook App. 23.6.0.

herself had monthly income of $1,162.71. She argued that because the resource allowance set by the county agency did not have the capacity to generate sufficient income to meet Burnett's monthly need, the examiner should increase the resource allowance. Increasing the resource allowance would also have allowed Irene to transfer assets to Burnett and avoided having to spend Irene's excess resources of $14,513 on the cost of care or for other purposes, making her eligible for Medicaid almost immediately (*see* Pet-Ap. 2a-3a, ¶ 3).

Under the "income first" rule, however, the simple solution to Burnett's $25 monthly shortfall was to consider $25 of Irene's monthly income available to him at the fair hearing. *Cf.* subsections (d)(1)(B) and (2). Applying Wis. Stat. § 49.455(8)(d), the hearing examiner concluded that he could not raise the resource allowance unless that was still necessary after Irene made her income available to Burnett. Because considering Irene's income available to Burnett would fulfill the minimum monthly need shortfall, the hearing examiner concluded that Burnett's resource allowance should not be increased and that Irene was correctly denied Medicaid benefits (*see* Pet-Ap. 3a, ¶ 4).

D. Judicial proceedings below.

The Circuit Court of Green County affirmed the WDHFS' decision in all respects (*see* Pet-Ap. 19a-22a) and Irene appealed. The Wisconsin Court of Appeals, District IV, reversed, holding that the "income first" rule of Wis. Stat. § 49.455(8)(d) conflicts with § 1396r-5(e)(2)(C) (*see* Pet-Ap. 1a-2a, ¶ 1).[18]

[18]The decision of the court of appeals court is published. *See Blumer v. DHFS*, 615 N.W.2d 647. Under Wisconsin law, the intermediate court has statewide jurisdiction and the published decision constitutes precedent binding on the WDHFS and the state courts, unless reversed or modified by the Wisconsin Supreme Court or, of course, this Court. *See generally In re Marriage of Cook v. Cook*, 208 Wis. 2d 166, 185-86, 560 N.W.2d 246 (1997).

According to the court, § 1396r-5(e)(2)(C) plainly and unambiguously requires the application of a "resource first" approach and does not permit the "income first" approach required by the Wisconsin statute. According to the court below, federal law requires that excess resources available to the institutionalized spouse be transferred to the community spouse to generate additional monthly income to make up the difference between the community spouse's personal income and the minimum monthly need *before* any available income possessed by the institutionalized spouse can be transferred to the community spouse (*see* Pet-Ap. 1a-2a, ¶ 1 and 7a-16a, ¶¶ 13-29).

The state court refused to give any deference to the informal views of either HCFA or the HHS Secretary. Rather, the court insisted, no deference is due because § 1396r-5(e)(2)(C) itself is plain and unambiguous (*see* Pet-Ap. 16a, ¶ 27).

The court below relied on two state intermediate appellate court decisions from Ohio decided in 1994. *See Kimnach v. Ohio Dept. of Human Serv.*, 645 N.E.2d 825 (Ohio App. 10 Dist. 1994), *appeal not allowed*, 644 N.E.2d 409 (Ohio St. 3d 1995); *Gruber v. Ohio Dept. of Human Serv.*, 647 N.E.2d 861 (Ohio App. 5 Dist. 1994), *appeal not allowed*, 646 N.E.2d 468 (Ohio St. 3d 1995). The court also gave no weight to more recent federal and state decisions unanimously concluding that the "income first" approach is based on a reasonable interpretation of 42 U.S.C. § 1396r-5 as a whole. *See Cleary II*, 167 F.3d at 811-12; *Chambers*, 145 F.3d at 802-04; *Cleary I*, 959 F. Supp. 222; *Thomas*, 682 N.E.2d at 879-81; and *Golf v. State Dept. of Social Services*, 697 N.E.2d 555, 558-63 (N.Y. 1998).

The WDHFS sought discretionary review by the Wisconsin Supreme Court on the federal question presented. That court denied review in an order dated September 12, 2000 (*see* Pet-Ap. 18a).

SUMMARY OF ARGUMENT

The spousal impoverishment provisions of the Medicaid Act, 42 U.S.C. § 1396r-5, were enacted in 1988 to address the impoverishing effects of the existing law on the spouses of persons requiring long-term institutional care, generally in nursing homes. The statute was also intended to curb abuses that allowed relatively affluent persons to shelter joint assets in the community spouse's name and to avoid contributing to the costs of long-term care for the institutionalized spouse. The purpose of the spousal impoverishment legislation was to protect the community spouse from pauperization by assuring that he or she has "a sufficient—but not excessive—amount of income and resources available" while the other spouse is institutionalized. *See* H. Rep. at 65, 1988 U.S.C.C.A.N. at 888.

Section 1396r-5 structures a complex mechanism for protecting a minimum level of income and both minimum and maximum levels of resources for use by the community spouse, once the institutionalized spouse begins receiving Medicaid benefits. *See* subsections (a)-(d). Superimposed on this complex administrative mechanism are remedial provisions, *see* subsection (e), which permit either spouse to request a fair hearing on any of the five components that define the spouses' financial relationship, including *inter alia*, the monthly income allowance from the institutionalized spouse and the determination of the resource allowance (the CSRA). *See* subsection (e)(2)(A)(i)-(v).

This case centers on one of the remedial provisions, subsection (e)(2)(C), which authorizes the revision of the

resource allowance if either spouse establishes that the resource allowance "is inadequate to raise the *community spouse's income*" to the level of the minimum monthly need by substituting for the standard resource allowance "an *amount* adequate to provide such a minimum monthly maintenance needs allowance" (emphasis added). The central dispute in this case is whether the language of subsection (e)(2)(C) is plain and unambiguous, as the court below decided; or whether the language is ambiguous and thus subject to interpretation, as petitioner WDHFS, HHS (the federal administering agency), two federal circuits and two state high courts unanimously agree.

The term "community spouse's income" is ambiguous because it can plausibly be interpreted two different ways based on the language of § 1396r-5 as a whole. As the court below apparently concluded, the term might be read to refer solely to income received in the community spouse's name (*see* Pet-Ap. 11a, ¶ 20). The more reasonable alternative interpretation, adopted by Wisconsin, by the federal agency and by the clear weight of state and federal appellate precedent, is that the term "community spouse's income" may include, in addition to his or her personal income as defined in subsection (b)(2), any income that the institutionalized spouse may transfer to the community spouse under subsection (d) in order to reach the minimum monthly need level, the MMMNA.

The uncertainty of the meaning of "community spouse's income" is exacerbated by the fact that subsection (e)(2)(C) neither requires nor prohibits use of the "income first" methodology, and does not specify whether the "amount" to be substituted for the resource allowance is in the form of income, or in the form of income-producing resources.

Section 1396r-5 is designed both to protect community spouses from impoverishment and effectively to force those

applying for Medicaid based on the statute's special eligibility provisions for married couples to contribute a share of their own resources to the costs of long-term care. The "income first" rule is based on a reasonable interpretation of the statute as a whole and on the purpose, function and context of the remedy provided by subsection (e)(2)(C).

The provision for raising the standard resource allowance, subsection (e)(2)(C), anticipates one post-eligibility problem facing community spouses--that of insufficient income to reach the level of the MMMNA. In the context of addressing the anticipated problem of inadequate income and the question whether the hearing officer should authorize an increase in the standard resource allowance, it is reasonable to consider anticipated post-eligibility income transfers from the institutionalized spouse to the community spouse as the "income first" rule does. Indeed, the legislative history of subsection (e)(2)(C) demonstrates that Congress expressly understood that states would be able to consider such future income transfers to the community spouse at the fair hearing.

Since 1993, the federal agency has issued a series of informal policy statements that has consistently permitted the states to employ the "income first" rule in administering the fair hearing provisions of § 1396r-5(e)(2)(C) (*see* Pet-Ap. 78a-90a). Under venerable precedent, recently reiterated by this Court, HHS' informal views are entitled to deference commensurate with their power to persuade. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *U.S. v. Mead Corp.*, ___ U.S. ___, 121 S. Ct. 2164, 2172 (2001).

The Secretary's long-standing interpretation of § 1396r-5(e)(2)(C) is persuasive and, therefore, entitled to deference. Apart from the consistency of the agency's policy views with the text and legislative history of § 1396r-5, HSS has consistently recognized that the income first rule is a reasonable, permissible interpretation of the statute. Finally, HHS' views are entitled to deference because the "income

first" rule is consistent with the competing public policies the statute is intended to serve.

ARGUMENT

THE "INCOME FIRST" PROVISION OF THE WISCONSIN MEDICAID STATUTE REQUIRING THAT POTENTIAL INCOME TRANSFERS FROM THE INSTITUTIONALIZED SPOUSE BE CONSIDERED BEFORE THE STANDARD RESOURCE ALLOWANCE IS INCREASED IS CONSISTENT WITH THE FEDERAL SPOUSAL IMPOVERISHMENT STATUTE, 42 U.S.C. § 1396r-5.

A. The "income first" rule is a reasonable interpretation of § 1396r-5, which is silent and does not require either an "income first" or a "resource first" approach.

1. The term "community spouse's income" is ambiguous.

According to Blumer and the Wisconsin Court of Appeals, the lengthy sentence that comprises § 1396r-5(e)(2)(C) is susceptible to only one possible reading and is thus unambiguous (*see* text at 2-3 and 17, above). Given the notorious complexity of the Medicaid statute as a whole, the intricacy of the spousal impoverishment provisions of § 1396r-5 itself,[19] and the confusing syntax of

[19] *Cf. Gray Panthers*, 453 U.S. at 43 n.14 (quoting with approval Judge Friendly's description of the Medicaid Act as "'an aggravated assault on the English language, resistant to attempts to understand it'");

the text, the characterization of that sentence as "plain and unambiguous" strains credulity to the breaking point.

In fact, regardless of how many careful readings one gives this language, the meaning never becomes clear because the undefined statutory term "community spouse's income" together with the unexpressed referent of "amount," is susceptible to at least two plausible interpretations. *Cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 410-11 (1993). "Community spouse's income" might be interpreted as referring solely to income received in the community spouse's name, as the court below apparently concluded (*see* Pet-Ap. 11a, ¶ 20). Alternatively as WDHFS, HHS and the clear weight of state and federal precedent recognize, the term may include both his or her income as defined in subsection (b)(2), together with any income the institutionalized spouse may transfer to the community spouse under subsection (d) in order to reach the level of the MMMNA.

The starting point for every case involving construction of a statute is the language of the statute itself. *See Beal v. Doe*, 432 U.S. 438, 444 (1977). *If* the language of a statute is plain and unambiguous, of course, """"that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."""" *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990), *quoting K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988).[20] In ascertaining whether the statute has a plain

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Tannler v. DHSS, 211 Wis. 2d 179, 191, 564 N.W.2d 735 (1997) (Abrahamson, C.J., concurring, describing MA statutes as extremely complex and "fairly . . . described as incomprehensible," "a confusing mix of means-tested programs and entitlements, and by uneasy compromises among different and often conflicting policies"); *Cleary II*, 167 F.3d at 807 (discussing the complexity of the spousal impoverishment provisions).

[20]This ordinary tenet of statutory construction corresponds with the first step of the *Chevron* analysis for cases involving an

meaning, the Court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. *Chevron*, 467 U.S. at 842-43. A fundamental principle of statutory construction is that "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. U.S.*, 508 U.S. 129, 132 (1993).

Looking to the language of § 1396r-5 then, the basic question here is: does the term "community spouse's income" have a plain meaning, viewed in the context of § 1396r-5(e)(2)(C) as a whole?

The Wisconsin Court of Appeals regarded this as a simple inquiry, readily answered by what it characterized as the "plain" and unambiguous language of the statute (*see* Pet-Ap. 11a, ¶ 19; 13a-14a, ¶ 23). In fact, although the court purported to find a plain, single meaning in subsection (e)(2)(C), the court engaged in an elaborate analysis of various other provisions of the statute in order to conclude that the statute was susceptible of a single reading, that requiring imposition of a "resource first" approach (*see* Pet-Ap. 11a-15a, ¶¶ 20-25).

First, the court employed its own definition of the word "income," the genesis of which it did not explain (*see* Pet-Ap. 5a-6a, ¶ 9). Based on its stated definition, the court below apparently limited the "income" of the community spouse solely to the personal income which that person receives in his or her own name each month (*see* Pet-Ap. 11a, ¶ 20; *cf.* subsection (b)(2)).

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administrative agency's interpretation of a statute it administers: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 842-43 (1984).

The court also noted that there is no specific language *directing* that "imputation of the institutionalized spouse's income should occur before raising the CSRA," further relying on what it called "the separate treatment of each spouse's income throughout § 1396r-5" (Pet-Ap. 11a, ¶ 20).[21] Based on these factors, the court opined:

> [T]he specific language of the statute contemplates that the hearing examiner will separate the community spouse's income from that of the institutionalized spouse's and consider only the community spouse's income in its review of whether the CSRA that has been established is sufficient to avoid impoverishment of the community spouse.

Id.

WDHFS, on the other hand, regards "community spouse's income" as susceptible to a broader, more inclusive reading. "Community spouse" is specifically defined in the statute, *see* § 1396r-5(h), and the possessive form must be interpreted in the context of § 1396r-5 as a whole. *Cf. Deal*, 508 U.S. at 132. Seen in that context, "community spouse's income" may include, in addition to that spouse's personal income under subsection (b)(2), any income which the institutionalized spouse may transfer to the community spouse under subsection (d) for the very purpose of meeting his or her MMMNA. This reading of "community spouse's income" is supported by the fact that, just as there is no language *directing* the hearing officer to include income

[21]Presumably, the court was referring primarily to § 1396r-5(b)(1), which generally forbids deeming income of the community spouse as available to the institutional spouse during institutionalization, and subsection (b)(2), which limits attribution of income between spouses "except as otherwise provided in this section," *i.e.*, § 1396r-5. WDHFS disputes the significance and, in part, the accuracy of the court's description, as discussed below.

which may be transferred to the community spouse from the institutionalized spouse (*see* Pet-Ap. 11a, ¶ 20), there is no language in the statute *prohibiting* it either.

Furthermore, while § 1396r-5(b)(1) expressly forbids deeming the community spouse's income as available to the institutionalized spouse, there is no complimentary provision that prohibits deeming the institutionalized spouse's income as available to the community spouse. To the contrary, § 1396r-5(d) is devoted primarily to the establishment of a detailed mechanism by which transfers of income to the community spouse are expected to occur. In fact, this very income transfer feature is a primary provision of the statute, designed to ensure that the community spouse has a protected minimum level of monthly income on which to live.

Ambiguity in a statute may arise from what is unstated, as well as what is stated. Subsection (e)(2)(C) contains references to both resources and income in its initial clauses, and allows the hearing officer to "substitute[] for the community spouse resource allowance . . . an amount adequate to provide such a minimum monthly maintenance needs allowance." The referent of "amount," however, is unexpressed. Amount of "resources"? Amount of "income"? Congress does not say, and thereby creates additional ambiguity. However, the purpose of allowing a substitution – to provide an adequate income stream to the community spouse – strongly supports the inference that subsection (e)(2)(C) permits consideration of potential income transfers from the institutionalized spouse to the community spouse.

In short, the statute is silent concerning whether the "income first" methodology is permitted under § 1396r-5(e)(2)(C). The court below was clearly wrong when it concluded that the statute expressly forbids use of the "income first" methodology: the statute, in fact, neither forbids nor requires it.

The view that the term "community spouse's income" is ambiguous finds strong support in recent cases. "[T]he statute is complex and contains many interrelated provisions that make it impossible to attach a plain meaning to provisions in isolation. As such we find the definition of 'community spouse's income' to be ambiguous within the context of subsection [1396r-5](e)(2)(C)." *Cleary II*, 167 F.3d at 807.[22] On the other hand, two intermediate Ohio appellate courts have agreed with the Wisconsin court that the same language is plain and unambiguous. *See Gruber*, 647 N.E.2d at 863; *Kimnach*, 645 N.E.2d at 829-30.

This stark division renders unnecessary further discussion of whether the term "community spouse's income" is ambiguous. Rather, the very fact that courts have differed concerning the proper interpretation of the term demonstrates the existence of ambiguity more tellingly than pages of textual argument. *See Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 739 (1996) (observing that existing conflict between court decisions alone was sufficient to establish that the wording of the statute was ambiguous). "[T]he differing views of the various courts and agencies that have interpreted subsection (e)(2)(C) provide a strong indication that the subsection is ambiguous." *Chambers*, 145 F.3d at 802. The court below erred in concluding otherwise.

[22] *See also Thomas*, 682 N.E. 2d at 879-80; *Golf*, 697 N.E.2d at 558-59; *Cleary I*, 959 F. Supp. at 232; *Cleary II*, 167 F.3d at 809; *Chambers*, 145 F.3d at 802-03.

2. The "income first" rule is a reasonable interpretation of § 1396r-5 and of the fair hearing remedy provided by subsection (e)(2)(C).

a. Section 1396r-5 is designed to balance the needs and responsibilities of institutionalized and community spouses.

The Medicaid program was created in 1965, when Congress added Title XIX to the Social Security Act, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980). Medicaid is a cooperative endeavor of the federal government and participating states, an example of "cooperative federalism." *Id.*, 448 U.S. at 308. The broad primary objective of the program is "to enable each State, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services." *Beal*, 432 U.S. at 444. From the early years of the program, therefore, this Court has recognized that Medicaid is limited to the needy, *i.e.*, those "whose income and resources are insufficient" to provide for their own care, *id.*, and that the program itself is constrained by "the practicable," *i.e.*, by limitations on federal and state funding and other resources. *See id. Cf. Chambers*, 145 F.3d at 797-98.

The spousal impoverishment protections of the Medicaid Act share both the humanitarian goals of Title XIX and the limitations inherent in a needs-based program to which the state and federal governments devote substantial, but nevertheless limited resources. The original House

Report, quoted above at 5 and 16, described the purpose of § 1396r-5 as ending the "pauperization" of the community spouse by assuring that he or she has "*a sufficient—but not excessive—amount of income and resources available*" while the other spouse is institutionalized. *See id.* at 65, 1988 U.S.C.C.A.N. at 888 (emphasis added).

The Wisconsin Court of Appeals paraphrased the House Report incompletely and inaccurately by stating that the single goal was to protect the community spouse from being impoverished by having "sufficient income and resources to live independently" (*see* Pet-Ap. 5a, ¶ 8). The Wisconsin court read out of the statute Congress' express recognition that the spousal impoverishment provisions were a limited response to a much larger problem and that the spousal impoverishment protections themselves would also require couples to pay their fair share of long-term care expenses when one spouse is institutionalized.[23]

The court below also ignored the fact that Congress carefully circumscribed the extent to which community spouses would be protected from impoverishment. Congress set specific limits on the amount of income and resources that would be protected for the community spouse, allowing exceptions only under the particular circumstances generally described in the fair hearing provisions of § 1396r-5(e)(1) and (2).

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[23]In addition to the quoted passage from the House Report, *see* 134 Cong. Rec. 20,692 (1987) (Representative Tauke, noting the goal of changing unfair impoverishment policies and "ensur[ing] that no one escapes contributing a fair share to nursing home care costs"); *id.* at 20,708, 20,752 and 20,758 (Representatives Weiss, Snow and Gray (Ill.)); *see also* 133 Cong. Rec. 29,353 (1987) (Senator Mikulski, the chief sponsor of an amendment adding spousal impoverishment protections to the Senate bill, characterizing the proposal as "modest and balanced"); 134 Cong. Rec. 13,231, 13,243, 13,261 and 13,733 (1988) (Representatives Rostenkowski, Waxman and Kennelley and Senator Pryor (describing the limitations)).

True, one of those exceptional circumstances occurs when the community spouse's income is not adequate to reach the level of the minimum monthly need or MMMNA, and Congress expressly allowed the remedy of raising the resource allowance under subsection (e)(2)(C). However, the dual, sometimes competing purposes of the spousal impoverishment provisions--protecting the community spouse from impoverishment and requiring elderly couples to pay their fair share of long term care expenses--must be kept in mind in interpreting § 1396r-5 generally and subsection (e)(2)(C) in particular.

Contrary to the Wisconsin court's constricted view of the statutory purpose, other courts have consistently recognized the competing purposes the spousal impoverishment provisions were designed to serve. The Third Circuit has aptly summarized the competing policy goals:

> The goal of the MCCA was to provide sufficient income and resources for the community spouse while also ensuring that a fair share of the couple's resources were [sic] employed for the care of the institutionalized spouse. . . .
>
> . . . [A] related goal of the MCCA is to preclude couples who possessed substantial resources from qualifying for Medicaid. . . . The 1988 Act curbed [resource] sheltering practice[s] by attributing certain amounts of the couple's overall resources to each spouse for eligibility purposes. The MCCA seeks to achieve a balance between spousal impoverishment and apportioning medical

> costs appropriately. It does this through a series of complex and interlocking provisions.

Cleary II, 167 F.3d at 805-06.

Similarly, the Supreme Judicial Court of Massachusetts has said: "[T]he MCCA struck a balance between preventing impoverishment of the community spouse and ensuring that no one avoided contributing his or her fair amount to medical care." *Thomas*, 682 N.E.2d at 876. *Accord*: Cleary *I*, 959 F. Supp. at 229; *Chambers*, 145 F.3d at 798.

b. The "income first" methodology is consistent with the purpose, function and context of subsection (e)(2)(C).

The federal spousal impoverishment statute, § 1396r-5 as a whole, governs the determination of Medicaid eligibility when one spouse is institutionalized and the other--the community spouse--is not. Subsection (e)(2)(C), "Revision of community spouse resource allowance," creates an administrative remedy for couples when the normal eligibility calculation, conducted at the local administrative level, results in the denial of eligibility for the institutionalized spouse based on excess resources, even though the community spouse will lack income of his or her own sufficient to reach the MMMNA once those excess resources are spent and the institutionalized spouse becomes MA-eligible.[24]

[24]By definition, cases such as this one arise only when the community spouse lacks sufficient monthly income of his or her own to reach the protected MMMNA, and the institutionalized spouse has *both* income and resources that are available to transfer to the community spouse to provide the extra income needed to meet his or her monthly maintenance need.

The fair hearing process, in this context, is entirely anticipatory: it provides a remedy for a couple to resolve the problem of inadequate community spousal income *before* resources which might be used to insure that protected level of income are dissipated and no longer available. The anticipatory nature of the subsection (e)(2) fair hearing remedy is key to understanding it, because the remainder of § 1396r-5 focuses on past events that determine eligibility--*e.g.*, the couple's total resources as of the time of initial institutionalization--and the status quo at the time of application--*e.g.*, the couple's income and resources as of that date.

The *purpose* of subsection (e)(2)(C) is to provide a method for ensuring that the community spouse has a minimum level of income--the MMMNA—on which to live after the institutionalized spouse becomes eligible for Medicaid and "the community spouse's income" alone is insufficient to do so. The fair hearing *function* is anticipatory, designed to solve that future problem--inadequate income--before it is too late to employ excess resources for that purpose. However, the Wisconsin court, Blumer's arguments and the two Ohio intermediate courts completely disregard the forward-looking nature of the subsection (e)(2)(c) hearing. *See* Pet-Ap. 1a-17a; *Kimnach*, 645 N.E.2d 825; *Gruber*, 647 N.E.2d at 868.

In support of its view that the "community spouse's income" could not include potential income transfers from the institutionalized spouse authorized under subsection (d), the court below insisted that the institutionalized spouse's income could not be deemed available to the community spouse at the fair hearing because "establishing the CSRA is a *pre-eligibility* determination, not a *post-eligibility* one"

(Pet-Ap. 12a, ¶ 21 (emphasis in original)). Moreover, according to the Wisconsin court, "§ 1396r-5(d)(1) directs the institutionalized spouse to transfer income to the community spouse *after* eligibility has been determined, not before" (*id.*) (emphasis in original).

The fact that the income transfer itself does not actually take place until after eligibility occurs is beside the point. Neither the language of § 1396r-5(b) and (c) nor the purpose of the subsection (e)(2)(c) hearing compel the conclusion that the hearing officer cannot consider potential income transfers from the community spouse. Indeed, the recent "income first" cases persuasively reject the artificial limitation the Wisconsin court inferred from subsection (d) that potential income transfers may be considered only after eligibility has been established.[25]

Practical constraints require that adequate resources be allocated to the community spouse before they are spent down and become unavailable for the community spouse's support. The reason for an advance determination of the resource allowance (during both the initial eligibility determination process and at the fair hearing) is to avoid unnecessary resource depletion before the institutionalized spouse qualifies for Medicaid. *See Cleary I*, 959 F. Supp. at 232. The determination of the ordinary resource allowance as well as the opportunity to raise that allowance at the fair hearing must be made *prior to* eligibility because, if the determination is delayed until the point of actual eligibility, the excess resources will have already been spent. It is then too late to transfer them to the community spouse if needed to provide additional income.

[25]*See generally Cleary I*, 959 F. Supp. at 232-33; *Thomas*, 682 N.E.2d at 879-80; *Golf*, 697 N.E.2d at 559; *Chambers*, 145 F.3d at 802; *Cleary II*, 167 F.3d at 809-10.

The pre-eligibility hearing remedy permits a spouse to show in anticipation of eligibility that if the resources are spent down to the level mandated by the standard resource allowance, the community spouse's minimum monthly need will not be met because of inadequate income. At the same time, interpreting subsection (e)(2)(C) to prohibit consideration of anticipated income transfers available from the institutionalized spouse under subsection (d) "frustrate[s] the design of the statute to provide for a transfer of assets only in an amount sufficient to ensure the community spouse's post-eligibility monthly income need." *See Cleary I*, 959 F. Supp. at 232.

The same practical constraints do not apply to protecting the income of the institutionalized spouse. There is no similar concern about spending down the institutionalized spouse's income because the income available for transfer from that spouse is paid regularly, usually monthly. As a result, during the ordinary eligibility determination process, the amount of the community spouse's income allowance need not be addressed prior to the determination of eligibility because that income will continue to be available after eligibility occurs.[26]

During the fair hearing process, however, there are no practical barriers to prevent the hearing examiner from addressing simultaneously the level of the resource allowance, the question of eligibility *and* the issue of

[26]*See Chambers*, 145 F.3d at 802 ("Because this concern is not relevant on the income side of the equation, the income allowance need not be determined on a pre-eligibility basis.").

anticipated income transfers from the institutionalized spouse because each affects the other. Thus,

> [i]n light of the detailed provisions of subsection (d) designed to make available to the community spouse as much, but only as much, of the institutionalized spouse's income as necessary to ensure her monthly need, it would be anomalous to construe subsection (e)(2)(C) in such a manner as to exclude the institutionalized spouse's income from the calculation . . . .

Cleary I, 959 F. Supp. at 232.

Other courts have rejected the argument embraced by the Wisconsin court that income transfers may not be considered at the fair hearing because there is no express provision authorizing pre-eligibility income transfers. *See Chambers*, 145 F.3d at 802. Rather, "[t]he better reading of subsections (b) and (d) is that these subsections provide a framework for preserving income for the community spouse by limiting the amount of the eligible institutionalized spouse's income which may be used to pay medical expenses." *Id., citing Thomas*, 682 N.E.2d at 879.

Moreover, the proper interpretation of subsection (e)(2)(C) must take into account the design of each of the fair hearing provisions of subsection (e)(2), rather than addressing subsection (e)(2)(C) alone. *See Cleary II*, 167 F.3d at 810. As that court explained, subsection (e)(2)(A) permits a fair hearing "if either spouse is dissatisfied with the determination of any one of the five components that create the community spouse's income," including the monthly income allowance from the institutionalized spouse, the amount of income otherwise available to the community spouse, the computation of the

spousal resource share, the attribution of resources and the determination of the CSRA. *Id.*

Based on this observation, the court concluded:

> The fact that the "fair hearing" subsection, (e)(2), starts in (e)(2)(A) with a recitation of the five components that make up the community spouse's income would indicate that a revision of one of those components, the CSRA, should be made only with a consideration of the other four. The five elements are interrelated and an adjustment of one will affect the other four. For this reason, a spouse may not be able to demonstrate an inadequacy of the CSRA, pursuant to (e)(2)(C), if a larger community spouse monthly income allowance is possible.

Cleary II, 167 F.3d at 810.

Indeed, if the hearing examiner is required to ignore anticipated income transfers from the institutionalized spouse to the community spouse under subsection (d), as the court below insisted, the spousal income transfer mechanism carefully created in subsection (d) will be irrelevant and entirely unavailable in cases where the institutionalized spouse has a high level of excess resources which would otherwise be available to defray the costs of long-term care. Subsection (d) itself "makes it clear that a certain portion of the community spouse's income may come from the income of the institutionalized spouse." *Cleary II*, 167 F.3d at 809. Indeed, that is the very purpose of subsection (d), yet the Wisconsin Court of Appeals' reading "would make (d) superfluous." *See id.*

The difference in the timing of when the resource allowance and the income allowance are actually determined

derive simply, if not exclusively, from practical concerns relevant to the usual initial eligibility determination process. These timing concerns have no practical significance during the remedial fair hearing process, where the hearing officer must simultaneously address the question of the institutionalized spouse's MA eligibility and the claimed inadequacy of the community spouse's anticipated income level in the context of whether to raise the amount of the resource allowance for the community spouse.

The Wisconsin Court of Appeals ignored the purpose and function of the fair hearing remedy by seizing on the timing of when the institutionalized spouse's income is actually transferred to the community spouse, as grounds for prohibiting consideration of income available from the institutionalized spouse at the fair hearing. However, "the better reading," *cf. Chambers*, 145 F.3d at 802, is that state hearing officers may, consistent with § 1396r-5 as a whole, consider income transferable to the community spouse from the institutionalized spouse under subsection (d) at a fair hearing under subsection (e)(2)(C).[27]

3. Congress understood that states would be able to consider income transfers from the institutionalized spouse to the community spouse during fair hearings under subsection (e)(2)(C).

The legislative history of the spousal impoverishment provisions of § 1396r-5 supports the inference that states

[27]*See Cleary II*, 167 F.3d at 811; *Chambers*, 145 F.3d at 804; *Golf*, 697 N.E.2d at 559; *Thomas*, 682 N.E.2d at 879-81; *Cleary I*, 959 F. Supp. at 232-34.

should be permitted to employ an "income first" rule at a fair hearing under subsection (e)(2)(C).[28]

The original House bill did not contain a provision allowing the community spouse to increase the resource allowance if his or her monthly income fell below the "minimum monthly maintenance needs allowance." *See* H. Rep. at 70, 1988 U.S.C.C.A.N. at 892-93. Instead, the initial House version restricted the sources of income available to the community spouse for meeting the MMMNA to the community spouse's own income, any income generated by the CSRA and transfers of income from the institutionalized spouse. *See id.* at 893-95; H. Rep. at 70-72; *see also* Conf. Rep. at 260-62, 1988 U.S.C.C.A.N. at 1038-40.

The original Senate bill did not contain any Medicaid spousal impoverishment provisions. In an effort spearheaded by Senators Mikulski, Mitchell and Kennedy, the bill was amended during floor debate to include spousal impoverishment provisions similar to the House bill. *See* 133 Cong. Rec. 23,950-58 (1987). However, the Senate version as approved expressly excluded from the eligibility determination "resources [available to the institutionalized spouse] that are necessary to produce income that is available to the community spouse." *See* Conf. Rep. at 263, 1988 U.S.C.C.A.N. at 1041; *see also* 133 Cong. Rec. 29,429-30 (1987). In other words, without providing for a fair hearing on the subject, the Senate version included a mandatory "resource first" method of protecting for the community spouse additional resources above the level of the resource allowance, as well as the income resulting from those resources.

[28]The Wisconsin Court of Appeals refused to consider evidence from the legislative history, based on its insistence that the statute was unambiguous (*see* Pet-Ap. 15a, ¶ 26).

The Conference Committee, however, adopted neither the House nor the Senate proposal regarding adjustments to the resource allowance. Unlike the House version, the compromise reached in conference authorized an adjustment to the resource allowance if needed to increase the community spouse's income to the level of the MMMNA (*see* Conf. Rep. at 265, 1988 U.S.C.C.A.N. at 1043). Unlike the Senate bill, the Committee did not achieve this result through a mandatory transfer of additional resources to the community spouse. *See* Conf. Rep. at 264-67, 1988 U.S.C.C.A.N. at 1042-45. Rather, the compromise authorized the provision for a fair hearing embodied in subsection (e)(2)(C). *See id.*

Tellingly, the Conference Committee described the legislative compromise that resulted in the fair hearing provisions of 42 U.S.C. § 1396r-5(e) as follows:

> The agreement does not exclude from countable resources those assets necessary to produce income available to the community spouse . . . . Instead, the agreement provides that either . . . spouse may request a fair hearing as to whether the community spouse resource allowance is adequate . . . . If the State, after such a hearing, determines that the community spouse resource allowance is inadequate, the State must allow the community spouse to retain an adequate amount of resources to provide the minimum monthly maintenance needs allowance (*taking into account any other income attributable to the community spouse*) . . . .

Conf. Rep. at 265, 1988 U.S.C.C.A.N. at 1043 (emphasis added); *see also id.* at 1045, Conf. Rep. at 267 (repeating the identical italicized language in explaining the fair hearing provisions directly).

Clearly, if Congress had intended to mandate the "resource first" approach required by the court below, it could have done so directly by adopting the language in the Senate bill. It did not. Instead, Congress adopted a compromise that authorizes an increase in the resource allowance at a fair hearing, recognizing that such adjustments may "tak[e] into account any other income attributable to the community spouse" (*see* Conf. Rep. at 265 and 267). Thus, the legislative history strongly supports the conclusion that Congress affirmatively contemplated that states would consider, at a fair hearing under subsection (e)(2)(C), income transferable to the community spouse from the institutionalized spouse under subsection (d).

B. The Secretary's longstanding, consistent interpretation permitting states to employ the "income first" rule is persuasive and entitled to judicial deference under *Skidmore*.

1. Congress has given the HSS Secretary exceptionally broad authority to interpret the Medicaid Act.

In the case of the Medicaid statutes, Congress has explicitly delegated to the HHS Secretary exceptionally broad authority to promulgate regulations defining eligibility requirements for Medicaid benefits, including standards for determining the availability of income and resources. *See* 42 U.S.C. § 1396(a)(17)(B) and (D) (1994 and Supp. 2000); *see also Gray Panthers*, 453 U.S. at 43; *cf. Batterton v. Francis*, 432 U.S. 416, 425 (1977) (construing nearly identical authority under another section of the Social Security Act). Plainly, the agency's broad rulemaking authority includes the setting of standards for the availability

of income and resources under the spousal impoverishment provisions of § 1396r-5 as well.

Confronted with an ambiguous statutory term, the courts generally defer to a permissible interpretation espoused by the agency entrusted with its implementation. *Cf. Good Samaritan Hospital*, 508 U.S. at 414.[29] "In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." *Batterton*, 432 U.S. at 425. Consequently, when the Court determines that Congress has not directly addressed the precise question presented, the Court does not simply impose its own construction on the statute, as it would absent an interpretation by the administering federal agency. *See Chevron*, 467 U.S. at 843. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Despite the Secretary's broad rulemaking authority to set eligibility standards for institutionalized spouses under § 1396r-5, the Secretary has not yet adopted formal legislative rules[30] interpreting the spousal impoverishment provisions.[31] While the federal agencies that administer the spousal impoverishment provisions of the Medicaid Act have not adopted formal regulations, neither have they remained

[29]*See Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524, 530 (1985) (absent a statutory definition of a Medicaid term, it is appropriate to consider the Secretary's interpretation of that term).

[30]*See generally* 1 K.C. Davis and R.J. Pierce, Jr., *Administrative Law Treatise*, 228-47, §§ 6.2-6.3 (3d ed. 1994); R.A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 42-63 (1990); *see also Batterton*, 432 U.S. at 425 n.9.

[31]Had the Secretary done so, this case would not likely exist, because such rules, if reasonable, would be entitled to binding deference. *See Chevron*, 467 U.S. at 843-44; *Mead Corp.*, 121 S. Ct. at 2171.

silent. *See Cleary II*, 167 F.3d at 806. HCFA and the HHS Secretary have issued policy memoranda and letters informally interpreting § 1396r-5 (*see* Pet-Ap. 78a-90a). In these pronouncements, HHS, through HCFA and the Secretary, has interpreted § 1396r-5(e)(2)(C) as permitting states to use the "income first" method in order to raise the community spouse's income to the minimum maintenance needs level during the fair hearing process (*id.*).

This Court has long recognized that informal policy interpretations by the agency charged with administration of a statute are entitled to some level of deference so long as they are informed, reasonable and persuasive.[32] Policy statements and guidelines for the administration of a federal program, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See Skidmore*, 323 U.S. at 140. "[A]n agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Mead Corp.*, 121 S. Ct. at 2175, *citing Skidmore*, 323 U.S. at 139-40.

This Court recently reiterated the vitality of *Skidmore's* central holding: "'The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Mead Corp.*, 121 S. Ct. at 2172, *quoting Skidmore*, 323 U.S. at 140.

[32]*See Skidmore*, 323 U.S. at 140; *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Mead Corp.*, 121 S. Ct. at 2171-76. *Cf. Chevron*, 467 U.S. at 842-45.

Accordingly, policy interpretations contained in formats such as HCFA "Regional State Letters" or in letters of the HHS Secretary are entitled to deference commensurate with their power to persuade. *See Christensen*, 529 U.S. at 587. The Wisconsin court erred by refusing to give *any* deference to the views of the state and federal agencies which administer the Medicaid program, based on its view of the statutory language as plain and unambiguous (*see* Pet-Ap. 14a and 16a, ¶¶ 6 and 27). *Cf. Mead Corp.*, 121 S. Ct. at 2171 and 2175-76.

The primary factor supporting the persuasiveness of HSS' longstanding policy permitting states to use the "income first" methodology is the agency's informed analysis of the text of § 1396r-5 generally and of the function and purpose of the fair hearing remedy provided by subsection (e)(2)(C) discussed at 28-34, above. In addition, the legislative history, discussed at 34-37, above, strongly supports the persuasiveness of HSS' view that states are permitted to employ the "income first" methodology in administering the fair hearing provisions of that subsection. *Cf. Cleary I*, 959 F. Supp. at 233; *Chambers*, 145 F.3d at 803-04; *Cleary II*, 167 F.3d at 810-11. These two factors alone warrant recognizing HSS' policy views as persuasive and entitled to deference under *Skidmore*.

2. HSS policy has consistently recognized that states are permitted to use the "income first" methodology.

Skidmore and *Mead Corp.* suggest a variety of other factors that courts may consider when examining the persuasiveness of an agency policy judgment in a particular case. *See id.*, 121 S. Ct. at 2171 and 2176; *Skidmore*, 323 U.S. at 140. One of those factors is the consistency of

the informal agency interpretation over time. *See id.*, 121 S. Ct. at 2171.

The consistency--or alleged lack of it--in HSS' treatment of the "income first" approach is the one deference factor on which the Wisconsin Court of Appeals chose to comment, noting without discussion "that DHHS has not interpreted the statute consistently" (*see* Pet-Ap. 16a, ¶ 27). If the court meant to suggest that HHS has waffled about its interpretation of the term "community spouse's income" or about whether the "income first" policy is a reasonable interpretation of § 1396r-5, the court below is wrong, as a review of the available evidence reveals.

In a policy statement attached to a "Chicago Regional State Letter" in 1993, HCFA expressly interpreted the term "community spouse's income" as including "whatever portion of the monthly income allowance the institutionalized spouse will make available to him or her" (*see* Pet-Ap. 83a). The statement indicated that the State "should include this income as available to the community spouse when it counts that spouse's own income" (*id.*). The cover letter and the statement, taken together, appeared to direct that states use the "income first" approach at a fair hearing under § 1396r-5(e)(2)(C) (*see* Pet-Ap. 78a-83a).

Shortly thereafter, in March 1994, HCFA issued a memorandum to "All Regional Administrators" clarifying the December 1993 policy statement (*see* Pet-Ap. 84a-86a). The HCFA memorandum acknowledged that the provisions of § 1396r-5 are "extremely complicated" and, "in places ambiguous and incomplete," citing the fair hearing provision of § 1396r-5(e)(2)(C) in particular (*see* Pet-Ap. 84a). The agency expressly disclaimed intent to mandate the "income first" approach set forth in the prior policy statement, explaining that "[s]tates have the option to use the 'income first' rule or to apply some other reasonable interpretation of the law until we have issued final regulations which

specifically address this issue" (Pet-Ap. 86a). Another "Regional State Letter" was issued in July 1994 to the same effect (*see* Pet-Ap. 87a-89a).

In March 1996, HHS Secretary Shalala reiterated this interpretation permitting both the "income first" rule and "other reasonable interpretation[s]"[33] of § 1396r-5(e)(2)(C) in a letter to the Governor of Ohio, characterizing the income first policy as a "legally permissible interpretation of the Medicaid statute" (*see* Pet-Ap. 90a).

According to these HHS policy statements, then, the term "community spouse's income" as used in § 1396r-5(e)(2)(C) may include consideration of potential income transfers from the institutionalized spouse to the community spouse under subsection (d) (*see* Pet-Ap. 78a-90a). Based on that view, the federal agency has expressly authorized states to adopt the "income first" method or to apply another "reasonable interpretation" of the law until HHS issues final administrative rules which specifically address this issue (*see id.* at 86a and 89a).

Obviously, HSS has been notably consistent in its view that states may employ an "income first" approach.

[33]None of the HHS' policy statements in the record expressly refer to, define or approve a "resource first" approach, including the broad, unlimited "resource first" approach mandated by the Wisconsin Court of Appeals (*see* Pet-Ap. 14a-16a, ¶¶ 24-29). *Cf. Ford v. Iowa Dept. of Human Services*, 500 N.W.2d 26, 29-32 (Iowa 1993) (approving use of a "resource first" approach based on the value of a single premium life annuity that would yield the community spouse sufficient income to reach the MMMNA; expressly *disapproving* what it called the "interest only" version of a resource first approach mandated by the court below in this case). Because states employ different versions of a "resource first" approach, this brief focuses primarily on the reasonableness of the "income first" approach expressly permitted by HCFA without analyzing other interpretations which may be used in other states.

The first of the HHS-HCFA policy statements in the record, dating from 1993, expressly construed the term "community spouse's income" as including "whatever portion of the monthly income allowance the institutionalized spouse will make available to" the community spouse (*see* Pet-Ap. 83a). That interpretation has never been withdrawn by the federal agency. Furthermore, during the eight-year period since 1993, the agency has never wavered in considering the "income first" approach embodied in Wis. Stat. § 49.455(8)(d) to be a reasonable and acceptable interpretation of the statute (*see* Pet-Ap. 78a-90a; *see also* Brief for the United States as Amicus Curiae, opposing the Petition at 9-14).

What HCFA *did* change shortly after issuing the 1993 policy statement (Pet-Ap. 78a-83a) was the initial suggestion that the "income first" approach is the *only* reasonable or permissible interpretation of the fair hearing provisions of § 1396r-5 (*see* Pet-Ap. 84a-89a). But if the statute is ambiguous, HHS' recognition that other reasonable interpretations of the statute are possible casts no shadow on the validity of the agency's long-held view that the "income first" approach is an entirely reasonable interpretation of the statute as well. Thus, the Wisconsin court's characterization of the agency's informal policy pronouncements as "inconsistent" is simply mistaken.

3. HHS' views are entitled to *Skidmore* deference because the "income first" rule is consistent with the competing public policies § 1396r-5 and Title XIX are intended to serve.

The conclusion that HHS' views are persuasive and entitled to deference under *Skidmore* is reinforced by their consistency with the principal, sometimes competing, dual

purposes the spousal impoverishment provisions of § 1396r-5 are designed to serve, *i.e.*, to insure that community spouses are able to retain sufficient, but not, excessive, income and resources with which to live,[34] and to avoid using public funds to subsidize the costs of long-term care for individuals who can afford to pay for such care from their own resources. *Cf. Cleary II*, 167 F.3d at 805-06; *Thomas*, 682 N.E.2d at 876.

When the competing purposes of the spousal impoverishment provisions of § 1396r-5 are fairly considered, it is apparent that permitting states to employ the "income-first" rule embodied in Wis. Stat. § 49.455(8)(d) strikes a reasonable balance between those competing purposes. The "income first" approach enables the community spouse to receive a protected level of income well above the federal poverty level while also permitting, pursuant to subsection (e)(2)(C), a community spouse whose "income" is inadequate to reach that protected level, access to a portion of the institutionalized spouse's income and, if necessary, a larger share of income-producing assets on which to live.

At the same time, the "income first" approach permitted by HHS effectively requires couples to bear a reasonable share of the cost of caring for the institutionalized spouse, in turn conserving medical assistance funds for other similarly-situated individuals.[35] The "income first" rule, in short, effectively requires couples to contribute to the costs of long term care, yet protects income and assets *at the levels specified by Congress and the states* for the use of community spouses, thus attempting to ensure institutional equity in the allocation of limited public funds.

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[34]*See generally* § 1396r-5; H. Rep. at 65, 1988 U.S.C.C.A.N. at 888.

[35]*See Chambers*, 145 F.3d at 797; *Cleary I*, 959 F. Supp. at 232; *Thomas*, 682 N.E.2d at 880-81.

A distinctive feature of the longstanding agency interpretation of § 1396r-5(e)(2)(C) rejected by the Wisconsin court is HHS' effort to protect the discretion of the individual states to define their own state policy with regard to subsection (e)(2)(C), allowing states the option to choose between the "income first" approach and "other reasonable interpretations" of the statute (*see* Pet-Ap. 84a-90a). This aspect of HHS' policy is simply an application of the concept of "cooperative federalism" embodied in the Medicaid program as a whole. *Cf. Harris*, 448 U.S. at 308.[36]

Finally, as recognized in the cases, the broad, unlimited version of the "resource first" approach mandated by the court below can readily be abused to nullify the statutory goal of requiring institutionalized spouses to pay for the costs of their own care within the monetary limits set by Congress for the protection of community spouses.[37] This potential for abuse may not be a necessary feature of a more carefully defined "resource first" approach. *Cf. Ford*, 500 N.W.2d at 29-32. Nonetheless, the version of the "resource first" approach mandated by the court below is unquestionably open to abuse by couples seeking to shelter significant amounts of resources without having to use them to pay their "fair share" of long-term care costs.[38]

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[36]*See also Batterton*, 432 U.S. at 431-32 (in context of a program based on cooperative federalism, the Court would not "lightly infer a congressional intention to preclude the Secretary from recognizing legitimate local policies in determining eligibility").

[37]*See Cleary I*, 959 F. Supp. at 232; *Thomas*, 682 N.E.2d at 880-81; *Golf*, 697 N.E.2d at 560; *see also Ford*, 500 N.W.2d at 32. *See also* Petition at 18-20; Reply to Brief in Opposition at 3-5.

[38]As described in the Petition at 19-20 n.20, Wisconsin now attributes a median amount of $992 per month or $11,928 annually of the institutionalized spouse's income to the community spouse in order to provide the latter with income up to the level of the MMMNA. If a community spouse is permitted, under the "resource first" approach

In contrast, the "income first" rule permitted by HHS and required in Wisconsin by statute strikes a reasonable balance. Although closely pegged to the monetary limits on resources and income set by Congress for protection of community spouses, the "income first" rule has a built-in safety valve--the fair hearing itself--to accommodate those unusual circumstances where a higher resource allowance is justified. In addition, the HHS policy permitting, but not requiring, states to adopt the "income first" approach enables the states themselves to make difficult accommodations between maximizing benefits to individual recipients while guaranteeing, to the extent possible, that sufficient funds are available to the greatest number of eligible individuals under Medicaid.

The spousal impoverishment provisions were intended as one part of the Medicaid "safety net."[39] They were never designed, however, fully to insulate elderly couples from the difficult, often painful choices necessarily associated with limitations on income and resources at any stage of life. HHS policy permitting but not requiring states like Wisconsin to employ the "income first" approach in the interpretation of § 1396r-5 is entirely consistent with the often competing policies the federal spousal impoverishment provisions are intended to serve.

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mandated by the court below, to retain assets generating that amount of income in lieu of the current income transfer required by Wis. Stat. § 49.455(8)(d), the community spouse will be able to retain substantial income-producing assets well above the current Wisconsin standard maximum resource allowance of $84,120, *see* n.6 above, in order to generate that amount of monthly or annual income. For example, resources valued at approximately $340,000 are necessary to generate monthly income of $992, assuming a 3.5% rate of return. At the same time, under the broad "resource first" approach mandated by the court below, the institutionalized spouse becomes eligible for Medicaid much sooner than under the "income first" approach.

[39]*See* Remarks of Senator Mikulski, 133 Cong. Rec. 29,353.

As argued above, HHS' views permitting the states to adopt the "income first" policy required by Wisconsin law are longstanding and consistent, and are based on an eminently reasonable interpretation of § 1396r-5 as a whole. In addition, the HHS' policy views are supported by the legislative history and by the statutory purposes § 1396r-5 is intended to serve. Accordingly, HHS' views are persuasive and thus entitled to deference under *Skidmore*.

CONCLUSION

For the reasons argued above, the decision of the Wisconsin Court of Appeals should be reversed and the record remanded with directions to reinstate the judgment of the trial court.

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